No. 20,737

IN THE

United States Court of Appeals

For the Ninth Circuit

D. R. KINCAID, LTD., and THOMAS A. GIULI, doing business as Kincaid-Giuli Joint Venture,

Appellants,

vs.

TRANS-PACIFIC TOWING, INC., BROKERS, INC., and CLARENCE C. T. LOO,

Appellees.

Appeal from the District Court of the United States for the District of Hawaii
Honorable C. Nils Tavares, Judge

BRIEF OF APPELLEE

ANTHONY B. CRAVEN,
for FRANK D. GIBSON, JR.,
Attorney for Appellee Clarence C. T. Loo.

HENSHAW, CONROY & HAMILTON.
1410 First National Bank Building,
Honolulu, Hawaii 96813,
Of Counsel.

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JURISDICTION

This is an appeal from a final decree in admiralty of the United States District Court for the District of Hawaii, which decree was filed on October 21, 1965. (Record, pp. 130-132.)

The United States District Court for the District of Hawaii had jurisdiction over the parties, as Appellants were a joint venture consisting of an Hawaiian

corporation and an individual resident of the State of Hawaii, and the principal Appellee was an individual resident of the State of Hawaii. (Record, pp. 3-4.) The subject matter of the libel was a contract of towage (Record, pp. 10-19) which is maritime in nature. *Mack Steamship Co. v. Thompson* (Mich. 1910), 176 F. 499, 110 C.C.A. 57; *Knapp v. McCaffrey,* 177 U.S. 638, 44 L.ed. 921 (1900); *The Oscada,* 66 F. 347 (D.C.N.Y. 1895). The contract, being maritime in nature, the District Court for the District of Hawaii had jurisdiction of the libel. 28 U.S.C. 1333.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal. 28 U.S.C. 1291.

STATEMENT OF THE CASE

The Libellants, hereinafter referred to as "Appellants", entered into a contract with Trans-Pacific Towing, Inc., hereinafter called "Appellee", dated March 30, 1961. (Libellants' Ex. 1.) By this contract Appellee agreed to tow its Barge No. 30 with its tug "Port of Bandon" from Honolulu to Midway and Kure atolls where Appellants' cargo would be loaded upon the barge after which Appellee would tow the barge to Honolulu via Midway. The fee for the voyage from Honolulu to Kure, Midway and return to Honolulu is set forth in paragraph 2 of said contract to be the sum of $19,722.00 to be earned on the departure of the tug from Honolulu for Kure. Paragraph 19 of the contract provided that prior to the departure of

the tug and barge from Honolulu for Kure and Midway, Appellants would deposit the charge for the voyage in the amount of $19,722.00 with Henshaw, Conroy & Hamilton and that upon arrival of the tug at Kure or upon the occurrence of any event excusing Appellee from performing or completing the transportation service to Kure and Midway, pursuant to paragraph 13 of the contract, Henshaw, Conroy & Hamilton shall pay the $19,722.00 to Appellee. By paragraph 6 of said contract, Appellants agreed that Kure would be a safe moorage or port for the barge. It was further agreed that Appellants would make all arrangements for the safe mooring of the barge at a dock, wharf or place at Kure so that the barge would safely lie afloat at all times of the tide, except that Appellants might at their risk beach the barge to facilitate loading operations but any damage caused by such beaching was to be repaired by Appellants at their expense.

Paragraph 11 of the contract provided that Appellants would insure the cargo in their names and in the name of Appellee against "all risks", including the payment of general average, salvage and special charges for the full value of the cargo. Paragraph 11 further provided that if Appellants failed to obtain the required insurance and Appellee commenced the voyage, then Appellants would have no claim against Appellee for any loss or damage even though the loss or damage was contributed to by the negligence of Appellee and furthermore, Appellants agreed to indemnify and save Appellee harmless from any claim

on account of such loss or damage. Appellants failed to obtain the insurance required by the contract.

Paragraph 12 of the contract further provided that neither Appellee nor the vessel shall be liable for any loss or damage occasioned to the cargo or the LCM arising or resulting from any cause whatsoever and whether or not due to negligence of Appellee, its officers, agents or employees, it being the intention of the agreement that Appellants would look solely to the insurance which it agreed to secure for the payment of any loss or damage to the cargo.

Paragraph 13 of the contract provided that neither Appellee nor the vessel would be responsible for loss or damage sustained by Appellants due to the failure or refusal of Appellee to perform or complete the performance of any transportation service provided for in the contract if the vessels or either of them was lost.

Pursuant to the contract, the tug "Port of Bandon" and Barge 30 departed Honolulu on April 8, 1961 and arrived at Midway at 0500, April 20, 1961, departed Midway for Kure at 0730, April 21, 1961, and arrived at Kure atoll at 1600, April 21, 1961, at which time the tug "Port of Bandon" turned Barge 30 over to Appellants. (Tr. pp. 158-159.) Appellants' LCM took Barge 30 into the lagoon at Kure across the lagoon and to the northwest shore of Green Island where the barge was beached and secured alongside a dock. Thereafter, the tug "Port of Bandon" lay off Kure atoll at a mooring buoy or at anchor.

From the evening of the 21st of April, 1961 to the morning of the 22nd of April, 1961, the "Port of Bandon" was secured to the Coast Guard mooring buoy about 600 yards south of the reef. (Tr. p. 159.) Shortly prior to noon on April 22, 1961, the "Port of Bandon" moved away from the mooring buoy so that a Navy tanker could tie to the buoy. (Tr. p. 159.) The "Port of Bandon" then anchored approximately 1200 yards from the mooring buoy and approximately 450 yards south of the reef. (Tr. p. 160.) The vessel was anchored with a Danforth anchor and approximately 400 feet of anchor cable. (Tr. p. 160.) The vessel had a draft of approximately 8 feet (Tr. p. 186) and lay anchored in 60 feet of water (Tr. p. 160). The "Port of Bandon" remained at this anchorage from midday April 22, 1961, until shortly after noon on April 24, 1961. (Tr. pp. 164-165.)

From April 22, 1961 through April 24, 1961 visual bearings were constantly being taken in order to check against any possible dragging of the anchor. (Tr. p. 163.) During this period the anchor never dragged. (Tr. pp. 164, 219.) During this same period the depth of the water never fell below 50 feet. (Tr. p. 160.)

On April 23, 1961 the Coast Guard cutter Ironwood anchored between the "Port of Bandon" and the buoy (Tr. p. 161), and approximately 450 yards off the reef (Tr. p. 162).

From noon April 22, 1961, until the morning of April 24, 1961 the wind was from the east northeast. (Tr. pp. 161, 163.) During this period the "Port of

Bandon" enjoyed a lee from the reef. (Tr. p. 161.) On the morning of April 24, 1961 the wind changed and began coming from the east and increased somewhat in force. (Tr. p. 164.) At about noon on April 24, 1961, because of an uncomfortable ride at that anchorage, the master of the "Port of Bandon" decided to pick up anchor and seek a new anchorage in the lee of the island, or "dog it" until the barge was due out. (Tr. pp. 164-165.) While in the process of picking up the anchor the "Port of Bandon" struck whatever caused its flooding and eventual grounding. (Tr. p. 165.) At the moment of striking this unknown object, the "Port of Bandon" was approximately 450 yards off the reef. (Tr. p. 167.) The vessel began to take on water faster than the vessel's pumps could pump it out and her master then proceed to run the vessel through a small channel in the reef and into shallow water within the lagoon where it was grounded. (Tr. pp. 166-167.)

While Barge 30 was at Kure it was secured to the dock with its stern aground on the sand. (Tr. p. 167.) On May 22, 1961, Barge 30 was taken out of Kure Lagoon by Appellants' LCM and was then towed by a Navy tug to Midway Island. (Tr. p. 72.)

SUMMARY OF ARGUMENT

The controlling question before the trial court was with respect to the negligence of Appellee. On this question the Court found that Appellants had not proved negligence by a preponderance of the evi-

dence. Appellee submits that the finding of no negligence was borne out in the evidence.

Appellee commences its argument with a review of the authorities concerning admiralty appeals where the appellant predicates error on a finding of fact. It is well established that findings of fact will not be set aside unless clearly erroneous and it is submitted that the evidence overwhelmingly supports the trial court's findings of fact and they should not be disturbed.

Appellee then counters Appellants' theory that contractual provisions exculpating one of the parties from its negligence are against public policy and void. Appellee points out that Congress has seen fit to limit the liability of carriers and vessel owners through legislation and, therefore, the argument that such provisions are against public policy is untenable. Appellee further contends that this particular issue is not a proper subject for review at this time because the trial court was not called upon to consider it. Thus, should this Court find that the vessel was lost through the negligence of her master, then whether the contract would exculpate Appellee from it own negligence would be a matter for the trial court upon remand.

In reviewing Appellants' second specification of error, Appellee points out that all of Appellants' theories were necessarily predicated upon negligence, because the contract between Appellants and Appellee explicitly relieves Appellee of further performance in the event of a loss of either the tug or barge.

Appellants' contention is that a negligent loss will not relieve Appellee from performance. Thus, the Court did not err in finding that all of Appellants' theories were predicated upon negligence.

Appellee argues that the Harter Act, 46 U.S.C. 190-196 is inapplicable in this case for several reasons. First, the contract between Appellee and Appellants constituted a private charter, a relationship to which the Harter Act does not apply. Secondly, the Harter Act limits liability of vessel owners where there has been physical injury to cargo, a factor in no way involved here. Thirdly, the parties did not intend that the Harter Act would apply because the contract embodies provisions expressly forbidden by the Harter Act and the courts will not isolate one provision of a contract which will result in negating other provisions.

In the alternative, Appellee urges that if the Harter Act is found to be applicable, then Appellee would not be liable to Appellants because not only was the tug "Port of Bandon" seaworthy at the commencement of the voyage, but also the striking of the object which caused the eventual grounding of the vessel could only be the result of an error in navigation and management of the vessel.

It is concluded that the judgment should be affirmed.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ITS FINDING THAT APPELLANTS DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE LOSS OF THE TUG "PORT OF BANDON" WAS PROXIMATELY CAUSED BY APPELLEE'S NEGLIGENCE

The controlling question in the trial below was whether or not the tug, "Port of Bandon", was lost through the negligence of her master. After hearing three days of testimony, the Court rendered a written decision wherein it found that Appellants failed to sustain their burden of proof on this issue and, consequently, were not entitled to recover damages either under the contract or otherwise.

Before considering various matters contained in Appellants' brief, it is well to review the authorities with respect to appeals on questions of fact. Prior to 1954 the appellate procedure in admiralty cases was unlike appeals in non-admiralty cases, the difference being that in admiralty an appeal was deemed a trial de novo and, though the trial court's findings of fact and conclusions of law were given certain weight, they were in no way binding on the appellate court. This procedure was all but terminated in *McAllister v. United States,* 348 U.S. 19, 99 L.ed. 20 (1954) wherein the court stated in 348 U.S. at page 20:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the court of appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure."

As to what constitutes a "clearly erroneous finding" the court went on to state in 348 U.S. at page 20:

> "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.'"

In essence then, the Supreme Court in the *McAllister* case engrafted Rule 52(a) of the Federal Rules of Civil Procedure into the admiralty rules. In substance, this rule gives rise to a presumption that the findings of fact of the trial court sitting without a jury are correct. 2B Barron and Holtzoff, *Federal Practice and Procedure,* Sec. 1131. Appellants bear the burden of showing that the findings of the trier of fact are clearly erroneous. *Watson v. Button,* 235 F.2d 235 (9th Cir. 1956).

It is a fundamental principle that in an appeal the appellate court must consider the evidence most favorable to Appellee, and indulge in all reasonable inferences which may be drawn from the evidence. *Worcester Felt Pad Corp. v. Tucson Airport Authority,* 233 F.2d 44 (9th Cir. 1956).

The United States Court of Appeals for the Ninth Circuit has voiced the "clearly erroneous" principle on numerous occasions. In *Clinton v. Joshua Hendy Corp.,* 264 F.2d 329 (9th Cir. 1959) a libel for maintenance was filed and the libellant appealed. In affirming the lower court, this court stated at page 333:

> "In considering the alleged error referred to in the first assignment, we must keep in mind that in

admiralty matters there is no longer a trial de novo on appeal, and the federal appellate tribunals have no greater scope of review in admiralty actions than they have under Rule 52(a) of the Federal Rules of Civil Procedure, McAllister v. United States, 1954, 348 U.S. 19, at page 20, 75 S.Ct. 6, at page 8, 99 L.ed. 20. Further, the burden is on appellant to show that the findings of the trier of fact are clearly erroneous. Watson v. Button, 9 Cir., 1956, 235 F.2d 235.

"The findings of the court are presumptively correct and will not be set aside unless clearly erroneous. Rule 52(a), Fed. R. Civ. P.

"The appellee Joshua Hendy Corporation, despite the judgment against it, is not the appealing party, and hence is the prevailing party. In such a case we are required to take the view of the evidence most favorable to appellee." (citations omitted)

See also

United States v. Staples, 256 F.2d 290 (9th Cir. 1958);

States Steamship Co. v. Permanente Steamship Corp., 231 F.2d 82 (9th Cir. 1956);

City of Long Beach v. National Development Co., 289 F.2d 586 (9th Cir. 1961);

Ramos v. Matson Navigation Co., 316 F.2d 128 (9th Cir. 1963).

Not only is there a presumption of correctness of the findings of fact and conclusions of law but these are binding on appeal unless clearly erroneous. Thus,

in *American President Lines, Ltd. v. Redfern,* 345 F.2d 629 (9th Cir. 1965) a libel was filed to recover for personal injuries sustained while working on a boiler. One of the issues involved was the contributory negligence of the libellant, and on this matter the appellate court stated at page 632:

> "The trial court's factual determination that Redfern was not guilty of contributory negligence in attempting to open the valve is of course conclusive on appeal unless 'clearly erroneous'."

One of the paramount reasons for not disturbing the findings of the lower court is because the trier of fact has the opportunity to hear all of the witnesses. In *Griffin v. Gardner,* 196 F.2d 698 (9th Cir. 1952) an action arose under the Carriage of Goods by Sea Act, 46 U.S.C., Sections 1300-1315 and the district court found that the ship was seaworthy and that there was no negligence. The libellant appealed and in discussing the question presently under review, it stated at page 700:

> ". . . In this setting the trial judge had to weigh the testimony and determine from the appearance and demeanor of the witnesses whether the stories they told portrayed the true facts concerning all matters in dispute. Appraising the credibility of these witnesses and the weight to give their stories was his function. We would not be justified in rejecting his findings on issues of fact unless, in light of the record, they failed to set forth a sufficiently clear picture of the fact situation they purported to cover for an appellate court to understand the basis of the court's conclusions of law and decree . . ."

The court went on to state the following at page 701:

> "The rule is plain that the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless it is clearly against the weight of the entire body of evidence . . ."

See also

Tawada v. United States, 162 F.2d 615 (9th Cir. 1947) and

Vileski v. Pacific-Atlantic S. S. Co., 163 F.2d 553 (9th Cir. 1947).

In light of the above authorities, the question is whether or not the findings of the trial court are supported by the evidence.

Appellants' brief commences with a review of the evidence and it is necessary at this juncture to see if Appellants' sundry statements of the evidence are borne out in the record. Appellants' brief, page 9, states that Captain Locey did not know the length of his ship. To the contrary, Captain Locey's testimony was that the vessel had a registered length of 80 feet but at the time of the trial he could not recall her over-all length though he knew what it was when he operated her. (Tr. pp. 203-204.)

Appellants' brief, page 9, states that Captain Locey had no experience in tropical coral reefs. To the contrary, Captain Locey had anchored in coral before though this was the first time in the type of coral such as that at Kure Island. (Tr. pp. 218-219.)

Appellants' brief, page 9, states that Captain Locey had no charts of Midway Island. To the contrary,

Captain Locey testified that he had no charts of "Midway Harbor". (Tr. p. 214.) It is at least doubtful whether the Navy will furnish anyone with a chart of Midway Harbor.

Appellants' brief, page 11, states that the Coast Guard findings locate Captain Locey closer to the reef than 450 yards. To the contrary, the Coast Guard findings placed Captain Locey 1200 yards west of the mooring buoy in 60 to 65 feet of water and approximately 450 yards south of the reef. (Respondents' Ex. G, p. 1.) The bearing of 254 degrees from the radar reflector was obviously erroneous because this would not be consistent with the other Coast Guard findings. At the trial, Captain Locey testified that he anchored in 60 feet of water (Tr. p. 160), 1200 yards west of the Coast Guard buoy (Tr. p. 160) and approximately 450 yards south of the reef (Tr. p. 160). Furthermore, the Coast Guard bearings were not taken off of the Coast and Geodetic Survey Chart No. 4177. (Tr. p. 230.)

Appellants' brief, page 12, states that Smith saw the vessel leave the mooring buoy and observed where it anchored. However true this may be, Smith also testified that it was hard to judge distances from where he could observe (Tr. p. 17) and that he could only observe the vessel from one point on the island (Tr. p. 21). Furthermore, Smith testified that the location of the anchorage on the 22nd did not cause him any concern. (Tr. p. 18.)

Appellants' brief, page 16, states that on April 24th Captain Locey got under way because he felt that he might be dragging anchor. To the contrary, Captain

Locey emphatically testified that at no time did he ever drag his anchor. (Tr. pp. 164, 187, 219.)

Appellants' brief, page 18, states that the depth of the water where Captain Locey anchored on April 22nd was between a "high" of 50 and 60 feet. To the contrary, Captain Locey testified that he anchored in 60 feet of water and that the least depth that he ever recorded was 50 feet. (Tr. p. 160.)

Appellants set forth the above facts in an attempt to have this Court find that the loss of the vessel was through negligence. It is clear that Appellants' view of the facts was not borne out by the evidence.

Starting from the presumption that the findings of fact and conclusions of law of the trial court were correct, Appellee now sets forth the record evidence which will sustain the decision of the lower court.

It is undisputed that Captain Locey was a man of vast experience on the seas and had been the master of many tugs. (Tr. pp. 154-157.) The trial court found Captain Locey to be a man of experience (Dec. p. 4, lines 4-9), wherein it stated:

> "This man was apparently a highly qualified tug master with experience of many different conditions along the west coast of the United States up to Alaska, and even though his experience did not include towing in tropical areas such as Hawaii and Kure, the court believes he was a competent tug master."

There is no dispute with the fact that when the tug arrived off Kure Island on April 21st, it anchored at the Coast Guard mooring buoy, which buoy was

located in 60 feet of water. (Respondents' Ex. G.) Thereafter, on April 22nd the tug was forced to leave the buoy because a Navy tanker came in and needed to tie to the buoy in order to discharge fuel. (Tr. p. 159.) From this point Captain Locey moved west approximately 1200 yards and anchored approximately 450 yards south of the barrier reef. (Tr. p. 160; Respondents' Ex. G.) When he anchored, he put out 400 feet of anchor cable in 60 feet of water. (Tr. p. 160.) The reason for anchoring in this location was because of the direction of the winds, this anchorage thereby placing him in the lee of the island. (Tr. p. 161.)

The uncontroverted evidence is that from April 22nd to April 24th, the day of the mishap, Captain Locey constantly took depth recordings and the least sounding that he ever received was 50 feet. (Tr. p. 160.)

On April 23rd a Coast Guard ship, the Ironwood, came to Kure Island briefly and anchored between the tug and the mooring buoy and about 450 yards off the reef. (Tr. pp. 161-162.) It would seem obvious that if vessels with much deeper drafts than a tug and with considerably less maneuverability than a tug considered their anchorages safe, Captain Locey was justified in anchoring where he did.

In order to provide safety for the tug and to guard against dragging the anchor, Captain Locey and his crew maintained 24-hour watches. (Tr. p. 162.) One of the ways in which they checked against a dragging of the anchor was to take almost constant visual bear-

ings. (Tr. pp. 160, 163.) Appellants produced no evidence whatsoever that the tug dragged its anchor. When asked whether or not he dragged anchor, Captain Locey testified that his anchor did not drag. (Tr. pp. 164, 187, 219.) Even Appellants' brief admits that there was no persuasive evidence that the anchor dragged. (A. B., p. 19.)

On the morning of April 24th the winds shifted and began coming from the east and the seas began coming from the same direction. (Tr. p. 164.) There was no dragging of the anchor and the tug remained 450 yards off the reef and swinging on its anchor. (Tr. p. 164.) Because of the weather condition and uncomfortable ride, Captain Locey decided to pick up the anchor and while in the process of picking up the anchor, and while still about 450 yards off the reef the tug struck whatever caused the flooding and its eventual grounding. (Tr. pp. 164-165.)

It should be noted that Captain Locey stated that he took soundings just prior to picking up the anchor. (Tr. p. 165.) In this connection he testified that he never obtained a sounding under 50 feet. This would result in a conclusion that on April 24th he was still anchored in water with a minimum depth of 50 feet.

Mr. Smith testified that on April 22, 1961 the location of the new anchorage did not cause him any concern. (Tr. p. 18.)

Much to do was made over the maps and charts that Captain Locey had with him. The uncontroverted testimony is that he had aboard a chart of Kure Island given him by Mr. Kincaid, which chart was

more complete than the United States Coast and Geodetic Survey Chart No. 4177 used at the trial. (Tr. p. 213.) In this connection when asked why he anchored where he did on April 22nd, Captain Locey testified as follows:

> "It shows on the chart as being the anchorage area. Also, the Coast Pilot refers to it as vessels having used it. At the time that I anchored up there, the wind, coming from the direction it was coming from, it gave me a lee from the sea and the wind." (Tr. p. 161.)

When these facts are collected, it is submitted that the evidence unquestionably showed that Captain Locey conducted himself in a prudent seamanlike manner and was not negligent from the moment that he anchored on April 22nd to the moment be began picking up anchor on April 24th or at any other time. The most that can be said is that on April 24th the tug struck an object which necessitated the grounding of the craft. It is a fundamental principle that the mere fact that an accident or injury has occurred, with nothing more, is not evidence of negligence on the part of anyone. *Prosser on Torts,* 3rd Ed., Sec. 39, p. 215.

Appellants' brief appears to take the position that the matters testified to by the experts must be given great weight and that the trial court almost, if not wholly, ignored their testimony. In connection with this testimony, the experts testified on direct examination to hypothetical questions which used chart locations set out by Smith on direct examination. When Smith located the position of the tug on the chart (Libellants' Ex. H) he stated:

> "It's hard to judge distances from the island where I had a chance to observe. I believe he was right in this area here."

It seems obvious that a location such as this is subject to gross inaccuracies and it is no wonder that the Court was inclined to place more weight on the location of the tug as given by Captain Locey and as set forth in the Coast Guard findings.

It is a well established rule that the weight to be accorded expert testimony is to be determined by the trier of fact. On the effect of such testimony, the following excerpt from 20 Am. Jur., *Evidence,* Sec. 1208, pp. 1059-1060 is illustrative:

> "There is, generally speaking, no rule of law which requires controlling effect or influence to be given to, and the court and jury are not required to accept in the place of their own judgments, the opinion testimony of expert witnesses merely because of the special knowledge of the witnesses concerning the matters upon which they give their testimony. Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are generally regarded as purely advisory in character; the jury may place whatever weight they choose upon such testimony and reject it, if they find that it is inconsistent with the facts in the case or otherwise unreasonable."

In the instant case, after hearing the evidence, the court chose not to find that anchoring where he did was a lack of prudent seamanship and therefore negligence. Thus, the Court stated (Dec. p. 3, lines 30-32; p. 4, lines 1-4):

> "Although two expert witnesses for the libellants testified—in answer to hypothetical questions, based on testimony in the case—that in their opinion there was a lack of prudent seamanship on the part of the tug captain, the court is not persuaded that his anchoring at the place he did, with a vessel as small as his, and with a draft of only eight feet, can be considered negligence."

With respect to the testimony of these experts, it should be noted that neither of them had ever been the master of a tug (Tr. p. 115); neither had ever been to Kure Island (Tr. pp. 115, 250); on cross-examination based upon hypothetical questions composed of the location of the tug as given by Captain Locey both testified that the anchorage on April 22nd was safe (Tr. pp. 119, 257). The corollary to this is that the anchorage would become unsafe if the anchor dragged yet the record is devoid of any evidence of dragging. Therefore, the anchorage through April 24th must have been just as safe as on April 22nd.

Appellants' second point of contention under their first specification of error concerns paragraph 13 of the contract which reads:

> "It is mutually agreed that time is of the essence of this agreement, and that Trans Pacific is on notice that Kincaid is under contract penalties to remove the return cargoes from Johnston and Kure, provided, however, that, neither Trans Pacific nor the vessels shall be responsible for loss or damage sustained by Kincaid due to the failure or refusal of Trans Pacific to perform or complete the performance of any transportation service herein provided for, if arising or resulting

from loss of or damage to the vessels, or either of them, or arising or resulting in whole or in part from any other cause beyond the control of Trans Pacific, or if in the opinion of Trans Pacific, or in the opinion of the master of the tug, to perform or complete the performance of the transportation service would result in loss or damage to the cargo or the vessels, or either of them."

The position taken by Appellants is that assuming that the paragraph excuses Appellee from further obligations under the contract in the event the tug or barge is negligently lost, such provisions are null and void and against public policy.

The contract between Appellants and Appellee was a voyage charter. *Gilmore and Black, supra,* Sec. 4-1, pages 170-173. Charter party carriage such as the present one is looked upon as private carriage and there are no statutory rules forbidding the adjustment of risks in any manner provided by the charter. Id. Sec. 4-5, page 181.

The argument that a contractual limitation of liability is contrary to public policy is untenable, especially in the field of admiralty. Illustrative of the public policy in this respect are the federal acts, viz., Carriage of Goods by Sea Act, 46 U.S.C., Sections 1300-1315, and Harter Act, 46 U.S.C., Sections 190-196, which in part read as follows:

Carriage of Goods by Sea Act

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; . . . .

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier. . . ."

Harter Act

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, . . ."

The basic theory behind these acts is that the owners cannot be held liable for negligence in the management of the vessel. It therefore follows that paragraph 13, assuming it does absolve Appellee of negligence, would not be against public policy.

Admittedly, there is a conflict in the authorities as to whether or not the parties can contract against negligence. The *Restatement of Contracts,* Sec. 574 recognizes the validity of such contractual provisions and states:

"§ 574. Legal Bargains For Exemption From Liability For Negligence.

A bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm, is legal except in the cases stated in § 575."

Restatement of Contracts, Sec. 575 referred to above concerns liability for the consequences of a willful breach of duty and is inapplicable to the present discussion. One of the most important factors in determining the validity of such excupatory clauses is whether or not the contracting parties are on an equal footing so far as bargaining power is concerned. See Annotation 175 ALR 8 "Validity of contractual provision by one other than carrier or employer for exemption from liability, or indemnification, consequences of own negligence." This principle was recognized by the drafters of the Harter Act and the Carriage of Goods by Sea Act as pointed out in *Gilmore and Black, supra,* Sec. 4-2, p. 175 wherein it is stated:

"It has been felt, apparently, that the bargaining power of charterers and owners is equal enough that they may be left to contract freely, a situation in sharp contrast to the great disparity between shiplines and the shippers of package cargo."

Clearly there was no disparity in bargaining power between Appellants and Appellee.

In essence, paragraph 13 was intended by the parties to relieve Appellee of further performance under the contract if any one of the following conditions was met:

1. Loss or damage to the tug or barge;

2. Loss or damage arising or resulting in whole or in part from any other cause beyond the control of Appellee; or

3. If, in the opinion of Appellee, or in the opinion of the master of the tug, to perform or complete performance of the transportation service would result in loss or damage to the cargo or the vessels, or either of them.

In substance, the first condition obviously means loss or damage through the negligence of Appellee or its employees. This is necessarily so because the second condition concerns losses or damages beyond the control of Appellee thereby causing losses or damages under part 1 to be from causes within the control of Appellee.

One of the early cases dealing with exculpatory provisions in towage contracts was *The Oceanica,* 170 F. 893 (1909 C.C.A.2d) cert. den. 215 U.S. 599, 30 S.Ct. 400, 54 L.ed. 343 wherein there was a towage contract under the terms of which the tow agreed to assume all risks. Discussing whether the tow had assumed the risk of the tug's negligence, the Court stated at pages 894-895:

> "A tug is not, in relation to its tow, a common carrier, being only bound to the exercise of ordi-

nary care. The Margaret, 94 U.S. 495, 24 L.ed. 146. It follows that a contract against liability for negligence cannot be construed in the case of a tug as it may in the case of a common carrier. The tug being only liable for negligence, if the tow agrees to assume all risks, no risks can be met except as those for which the tug is liable, viz., the consequences of her own negligence. There is no other class of risks upon which the clause can operate as in the case of common carriers, viz., those arising from liability as insurer. Unless construed to cover the tug's negligence, the stipulation is meaningless; i.e., an agreement by the tow to assume risks to which she is subject without any stipulation and for which there is no liability at all on the part of the tug . . ."

Thus, the Court recognized the validity of such clauses.

With respect to the decision in *The Oceanica, supra,* Justice Frankfurter, in his dissenting opinion in *Bisso v. Inland Waterways Corp.,* 349 U.S. 85, 99 L.ed. 911 (1955) stated 349 U.S. at pages 108-109:

"Concededly, the Second Circuit has, ever since the decision in The Oceanica (NY) 170 F. 893 (1909), upheld the validity of agreements whereby towers avoid liability for their own negligence. Its most recent reiteration of this position is found in Nielson v. United States (NY) 209 F.2d 958, today reversed on other grounds, post p. 939. To the Second Circuit there must now be added the Courts of Appeals for the Fourth and Fifth Circuits by virtue of their decisions in this case and in Boston Metals Co. v. The Winding Gulf (Md.) 209 F.2d 410, revd 349 U.S. 122,

> 99 L.ed. 933, 75 S.Ct. 543. It is not without significance that the Second and Fifth Circuits are first and second in volume of admiralty litigation."

Appellants' brief, page 26, asserts that paragraph 13 is too ambiguous to be construed a clause which would exculpate the Appellee for damages suffered by Appellants. Appellee fails to see wherein the ambiguity lies. As pointed out above, paragraph 13 comprehends loss or damage to the tug or barge through causes within the control of Appellee *or* loss or damage resulting from causes beyond the control of Appellee. Obviously a negligent loss would be a loss within the control of Appellee and the parties clearly intended to exculpate Appellee in the event of such a contingency.

Though Appellee firmly believes that paragraph 13 of the contract absolves it from negligent loss of the tug, Appellee further contends that this issue is not a proper subject for determination on the present appeal. The reason is because the trial Court found that Appellee was not negligent and, therefore, was not liable to Appellants. The issue as to whether or not paragraph 13 would absolve Appellee from its negligence was never considered. Had the Court found Appelle negligent then, and only then would the issue have arisen. Assuming for purposes of argument that this Court should find Appellee to have been negligent, then this Court should remand the case to the District Court for a determinattion of this issue.

Finally, Rule 18 of the United States Court of Appeals for the Ninth Circuit specifically provides:

> "2. This brief shall contain, in order here stated—(d) in all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged."

Appellants' brief has not specified this issue as an error and, therefore, it should not be considered on this appeal. Indeed, because the Court made no finding on this matter, there could be no error to specify.

Pursuant to Rule 18(3) of the rules of the United States Court of Appeals for the Ninth Circuit, Appellee herein sets forth record references to the evidence relied upon by Appellee as supporting the trial Court's finding of fact that Appellants did not prove by a preponderance of the evidence that the loss of the tug "Port of Bandon" was proximately caused by Appellee's negligence.

Howard Jones

Page 116, lines 10-15
" 117, " 5-7
" 118, " 9-25
" 119, " 1-12

Wayne Locey

Page 154, lines 8-25
" 155, " 1-25
" 156, " 1-25
" 157, " 1-25
" 160, " 1-19

Wayne Locey (continued)

Page 161, lines 3-25
" 162, " 1-25
" 163, " 1-25
" 164, " 1-18
" 167, " 12-16
" 171, " 21-25
" 172, " 1-7
" 174, " 3-22
" 181, " 14-24
" 187, " 4-23
" 211, " 1-6
" 213, " 3-20
" 215, " 16-25
" 216, " 1-2, 20-25
" 217, " 1-5
" 219, " 11-15, 18-22
" 229, " 3-19
" 230, " 2-21
" 232, " 12-25
" 233, " 1-12
" 236, " 15-20

Chester A. Jackson

Page 256, lines 3-25
" 257, " 1-25
" 258, " 1-19

Captain Jackson

Page 256, lines 3-25
" 257, " 1-22
" 258, " 5-19

II. THE TRIAL COURT DID NOT ERR IN FINDING THAT ALL OF APPELLANTS' THEORIES WERE PREDICATED UPON FINDING THAT APPELLEE WAS NEGLIGENT

Appellants' second specification of error is that the trial Court erred in finding that all of Appellants' theories were predicated upon a finding that Appellee was negligent. The main thrust of Appellants' argument is summed up at page 30 of Appellants' brief as follows:

> "Kincaid contends that Trans-Pacific should not be excused for its failure to perform under a contract for the reason of 'impossibility' because the impossibility was caused by his negligence in sending out an inexperienced captain and crew in strange waters with no charts."

In essense, Appellants refute their own specification of error because they state that impossibility is no defense if it is brought about by negligence. Thus, whether or not Appellee is liable to Appellants would depend upon whether Appellee was negligent.

The pre-trial order sets forth Appellants' theories as follows:

> "(a) Respondents could have chartered another seagoing tug to return Barge 30 to Honolulu so that impossibility is not available as a defense.
>
> "(b) Respondents are not excused from performance for the reason that it cannot show that the loss of its tug was due to causes beyond its control.
>
> "(c) Respondents cannot rely upon the provisions of its contract to excuse itself from an obli-

gation to perform its contract for the reason that the terms thereof are void and against public policy and unenforceable."

Under theory (a), paragraph 13 of the contract would be a defense to further performance if the trier of fact found no negligence. The impossibility of performance argument would be irrelevant. Under theories (b) and (c) the controlling issue is clearly negligence.

Appellants' main contention here is that the Harter Act, 46 U.S.C., Sections 190-196 is applicable to the present controversy and it suggests that this is the position taken in the Court below by Appellee. It should be pointed out that Appellee never asserted the Act was applicable and, in fact, contends that it has no application. Appellants state (A. B., p. 33) that the Carriage of Goods by Sea Act, 46 U.S.C., Sections 1300-1315 is inapplicable because the contract contained no express words incorporating it and, therefore, the Harter Act is applicable if either Act is applicable. Note that there were no express words adopting the Harter Act either. A reading of the Harter Act indicates that it is inapplicable because it is directed at limitation of liability for the loss or damage to merchandise or property arising from neglect, fault, or failure in proper loading, stowage, custody, care, or proper delivery. (46 U.S.C., Sec. 190.) In other words, the Act relates directly to physical damage to merchandise or property (i.e., cargo) a factor which in no way is involved here.

Appellants predicate this assignment of error on the theory of breach of contract through negligence. The Harter Act was enacted to limit the liability of carriers but not with respect to breach of contract matters.

It is well established that the Harter Act is inapplicable to private charter situations. *Gilmore and Black, supra,* page 175. Indeed, the Act can be adopted by contract in such instances but Appellee submits that the Act was not adopted nor intended to be adopted under the contract between Appellee and Appellants. Appellants contend that the Act was adopted by virtue of paragraph 15 of the contract, which paragraph provides:

> "15. Trans-Pacific shall have all rights to limitation of and exemption from liability as are granted by federal statutes to owners and charterers of vessels, and nothing herein contained shall constitute a waiver thereof."

The guidelines for contract construction are set forth in 17 Am. Jur. 2d, *Contracts,* Sec. 258 wherein it is stated:

> "It is a universal rule that in construing contracts the courts attempt to arrive at the intention of the parties as expressed in the instrument as a whole. The contract being construed is to be considered as a whole and the meaning gathered from the entire context, and not from particular words, phrases, or clauses, or from detached or isolated portions of the contract. All the words in a contract are to be considered in determining its meaning, and the entire contract in all of its parts

should be read and treated together. This is so because each portion of a contract is qualified by other portions which are relevant thereto, and has no separate existence apart from them. Moreover, the entire agreement is to be considered, to determine the meaning of each part . . .".

The Harter Act, 46 U.S.C., Sec. 190, in substance provides that it is unlawful for a carrier to contract against its negligence. With this in mind, note paragraphs 12 and 13 of the contract which specifically contract against negligence. Starting with the premise that the Harter Act is inapplicable to private charters such as existed in the instant case, it would be illogical to conclude that the contracting parties intended to adopt a Federal Act which would negate two of the paragraphs of the contract. The only construction that can be given to paragraph 15 is that in the event a Federal Act existed which would limit liability of owners or charterers of vessels and which Act was consistent with the contract, then such Act was to become a part of the contract. Assuming for purposes of argument that the Harter Act is found to be applicable, it is Appellee's position that it would not be liable to Appellants because there is an abundance of evidence that the vessel was seaworthy. It is well settled that the time for applying a test of seaworthiness is at the moment the voyage commences. *The Havana,* 45 F. Supp. 244 (1942 D.C.S.D.N.Y.). See also *Cullen Fuel Co. v Hedger,* 200 U.S. 82, 54 S.Ct. 10, 78 L.ed. 189 (1933) (re implied warranty of seaworthiness). The owner of the vessel need only exer-

cise due diligence in making the vessel seaworthy. 46 U.S.C., Sec. 192. Once it is established that the vessel is seaworthy, then if the loss occurs through a fault or error in navigation or in the management of the vessel, the owners are not liable. 46 U.S.C., Sec. 192.

Appellee contends that the vessel was seaworthy when the voyage commenced and that the loss of the vessel was, at most, through an error in navigation. The uncontroverted facts showed the following:

That Captain Locey was a highly experienced sea captain (Tr. pp. 154-157) and the trial court found him to be competent (Dec. p. 4, line 9); that the vessel was physically in good condition to commence the voyage (Tr. pp. 157, 176-177); and that Captain Locey had aboard adequate charts of Kure Island (Tr. pp. 161, 213-214).

There is no evidence that the vessel dragged its anchor at any time after anchoring on April 22nd and this was so found by the lower court. (Dec. p. 4, lines 21-22.) Thus, if Captain Locey should have anchored in a different location or gotten under way earlier on April 24th, this would be an error in navigation or management of the vessel which are matters upon which no liability can be predicated under the Harter Act. If it was a negligent stranding, then it was an error in navigation and management of the vessel. *The Monarch of Nassau,* 155 F.2d 48 (5th Cir. 1946.)

Appellants cite cases for the proposition that under the Harter Act the burden is upon the carrier to show due diligence in making the vessel seaworthy. With

this proposition Appellee has no quarrel. However, Appellants cite the case of *Moran v. United States,* 82 F.Supp. 525 (1949 D.C.S.D. Mass.) for the proposition that a tugboat is unseaworthy because of a deckhand's lack of qualification and experience. Appellee points out that the cited case arose after a stevedore fell from a defective ladder on a ship and thereafter filed a libel in admiralty for his injuries. The Court merely held that the respondent was negligent in maintaining a ship with a ladder not securely fastened to the side of the hold and, therefore, the ship was unseaworthy.

Appellants cite *The Nordpol,* 84 F.2d 3 (2d Cir. 1936) for the proposition that if one employs a seaman who cannot understand orders the boat is not seaworthy or properly manned. Appellee points out that in the cited case a libel was filed due to a collision and the Court held that respondent's vessel was unseaworthy because the helmsman could neither speak nor understand English.

It is submitted that the evidence in the instant case established that the vessel was properly manned and this evidence was uncontroverted by Appellants.

CONCLUSION

It has been the purpose of this brief not only to refute the arguments of the Appellants, but also to draw forth the evidence adduced in the trial Court below in order to establish that it did not err in its finding of fact.

It is submitted that Appellants have failed to sustain any of their specifications of error and that, therefore, the judgment of the trial Court below should be affirmed.

Dated, Honolulu, Hawaii,
April 1, 1966.

Respectfully submitted,
ANTHONY B. CRAVEN,
for FRANK D. GIBSON, JR.,
Attorney for Appellee
Clarence C. T. Loo.

HENSHAW, CONROY & HAMILTON,
Of Counsel.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals, for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ANTHONY B. CRAVEN,
for FRANK D. GIBSON, JR.,
Attorney for Appellee
Clarence C. T. Loo.